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2017 OCT 11 11:14:04

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF COCONINO**

STATE OF ARIZONA,

No. CR2017-00886

Plaintiff,

**NOTICE OF AUTHORITY**

vs.

(Judge Dan Slayton—Div. 2)

JAMES WOMBLE,

Defendant.

The State of Arizona, by and through the undersigned Deputy County Attorney, offers the following memorandum of points and authorities in anticipation of the upcoming preliminary hearing and the issues that may be raised therein.

**I. PROCEDURAL POSTURE**

On 7/25/17, James Womble stabbed Peter Gillespie causing his death. Womble claimed he was acting in self-defense. Womble's statement to police indicates that there was a confrontation prior to the stabbing. The State has charged James Womble with second degree murder by direct complaint pursuant to Ariz. R. Crim. P., Rule 2.2. It is anticipated that the accused will raise issues of adequate provocation and self-defense. The State offers this Notice of Authority addressing some of the issues the Court will consider at the preliminary hearing.

**II. PRELIMINARY HEARING**

The preliminary hearing's exclusive purpose is to determine "whether probable cause exists to hold the defendant for trial." Ariz. R. Crim. P. 5.3(a). The objective is "not to conduct a

1 trial on the merits, but to determine whether a public offense has been committed and whether  
2 there is sufficient cause to believe that the accused committed it.” *Brailsford v. Foster*, 242 Ariz.  
3 77, ¶ 13 (App. 2017); quoting *State v. Altman*, 107 Ariz. 93, 95, 482 P.2d 460, 462 (App. 1971).

4 To comport with due process at a preliminary hearing, a magistrate “shall admit only  
5 such evidence as is material to the question whether probable cause exists.” Ariz. R. Crim. P.  
6 5.3(a). All parties have the right to “cross-examine the witnesses testifying personally against  
7 them, and to review their previous written statements prior to such cross-examination.” *Id.* At the  
8 close of the State’s case, “the magistrate shall determine and state for the record whether the  
9 prosecution’s case establishes probable cause,” after which the defendant is permitted to “make a  
10 specific offer of proof, including the names of witnesses who would testify or produce the  
11 evidence offered.” *Id.* The magistrate is under no obligation to allow the accused to present  
12 evidence beyond the offer of proof if “the magistrate determines that it would be insufficient to  
13 rebut the finding of probable cause.” *Id.* “Whether to allow [the accused to present evidence] is  
14 within the discretion of the magistrate, given the issues involved in the case and they type of  
15 evidence being offered.” *Foster*, 242 Ariz. at ¶ 17.

### 18 III. DEFENSES AT A PRELIMINARY HEARING

19 As stated above, a finding of probable cause is the sole issue at a preliminary hearing. *Id.*  
20 at ¶ 20. “A magistrate conducting a preliminary hearing should be mindful that his duty is not  
21 [to] determine the ultimate guilt or innocence of a defendant, ... but only to determine whether  
22 there is probable cause to believe defendant guilty of the offense charged, and leave to the trial  
23 tribunal the final determination of the application of the law to the facts.” *Williams*, 85 Ariz. at  
24 117–18. “The full and complete exploration of all facets of the case is reserved for trial and is not  
25 the function of a preliminary examination.” *Altman*, 107 Ariz. at 95.  
26



1           **A. Adequate Provocation and Manslaughter**

2           The defendant is charged with Second Degree Murder. At the preliminary hearing, the  
3 defense may argue that the Court should find probable cause of manslaughter rather than second  
4 degree murder based on adequate provocation. Manslaughter is not a lesser-included offense of  
5 second degree murder, but a lesser degree of the single crime of criminal homicide. *State v. Lua*,  
6 237 Ariz. 301, 303 ¶ 7 (2015); see also *State v. Schantz*, 98 Ariz. 200 (1965). This is due to the  
7 presence of a “different circumstance” of “sudden quarrel or heat of passion resulting from  
8 adequate provocation by the victim.” *Peak v. Acuna*, 203 Ariz. 83, ¶ 6 (2002); see also A.R.S. §  
9 13-1103(A)(2). So, although manslaughter is technically not a lesser-included offense, the  
10 element of adequate provocation is often used as an affirmative defense against second degree  
11 murder. See *State v. Eddington*, 226 Ariz. 72, 82 ¶ 33 (App. 2010). In these cases, adequate  
12 provocation is “the added mitigating circumstance” that reduces second degree murder to  
13 manslaughter. *Lua*, 237 Ariz. at 303 ¶ 7.

14           The affirmative defense of adequate provocation must be proved to a jury by a  
15 preponderance of the evidence. *Eddington*, 226 Ariz. at 82 ¶ 33; see also *Foster*, 242 Ariz. at ¶  
16 26. “Under *Altman*, a magistrate can properly exclude evidence and argument from a preliminary  
17 hearing regarding . . . affirmative defenses as such defenses are to be raised at trial.” *Foster*, 242  
18 Ariz. at ¶ 26; see *Altman*, 107 Ariz. at 95. Thus, this Court may use its discretion to set aside the  
19 issue of adequate provocation at the preliminary hearing. If the Court finds however that the  
20 evidence for adequate provocation is strong enough to rebut a finding of probable cause for  
21 second degree murder, the Court may reduce the charges, finding probable cause for  
22 manslaughter. See *Foster*, 242 Ariz. at ¶ 28.

23           **B. Justification: Use of Deadly Physical Force**

24           Justification in the use of deadly physical force is a non-affirmative defense raised  
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1 pursuant to A.R.S. § 13-405. The State expects the defendant to raise this defense as well. *Foster*  
2 makes clear that resolution of non-affirmative defenses and justifications—such as self-  
3 defense—is “premature at the preliminary hearing stage.” *Foster*, 242 Ariz. at ¶ 27. While the  
4 State must “produce competent evidence to convince the magistrate that a trial should be held,”  
5 and while a “magistrate is required to consider a defendant’s justification defense” in  
6 determining whether probable cause exists, the magistrate “does not resolve the ultimate  
7 question [regarding the effectiveness of the justification defense] if the evidence is in conflict, as  
8 that resolution is left to the jury.” *Id.* In *Foster*, the magistrate at the preliminary hearing “stated  
9 on the record that he considered Petitioner’s justification defense but nonetheless found there was  
10 insufficient evidence to rebut the probable cause determination.” *Id.* at ¶ 28. The Appeals Court  
11 ruled that “[b]ecause the evidence was in conflict whether [the accused] was justified, the proper  
12 place to resolve the issue is at a jury trial.” *Id.* At the preliminary hearing, the Court must  
13 consider a defendant’s self-defense justification, but so long as there is conflicting evidence, the  
14 State has met its burden of proof and the case should move beyond these initial stages toward a  
15 full and proper resolution at trial. See *Altman*, 107 Ariz. at 95.

#### 18 IV. CONCLUSION

19 The State is aware that the Court is well familiar with the law relating to preliminary  
20 hearings and justification defenses. This Notice of Authority is offered due to the intersecting  
21 affirmative and non-affirmative defense considerations in this case, and the somewhat  
22 complicated procedural intersection of those issues at preliminary hearing.

23 RESPECTFULLY SUBMITTED this 14th day of October, 2017.

25 WILLIAM P. RING  
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26 By Bryan F. Shea  
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COPY of the foregoing  
mailed/delivered this  
11th day of October, 2017,  
to:

The Honorable Dan Slayton  
Division 2  
Coconino County Courthouse  
Flagstaff, AZ 86001  
Office of the Public Defender

By:

